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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ARTURO HERNANDEZ, Defendant and Appellant.	B147351 (Los Angeles County Super. Ct. No. VA060364)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick T. Meyers, Judge. Affirmed.

Malik C. Burroughs, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Marc E. Turchin, Assistant Attorney General, Marc J. Nolan and Jennifer Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Miguel Arturo Hernandez, was charged with mayhem (Pen. Code, § 203; count 1), second degree robbery (Pen. Code, § 211; count 2), and assault with a deadly weapon or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count 3) with allegations that he used a deadly weapon in the commission of mayhem and felonious assault (Pen. Code, § 12022, subd. (b)(1)) and that he personally inflicted great bodily injury on the victim during commission of robbery and felonious assault (Pen. Code, § 12022.7, subd. (a)). (Defendant is also known as Miguel Hernandez Ramirez and Miguel Ramirez Hernandez.) A jury acquitted him of mayhem, but convicted him of simple assault (Pen. Code, § 240) as a lesser offense on count 1. The jury convicted him of felonious assault on count 3, but acquitted him of robbery. The jury found that he personally inflicted great bodily injury on the victim of the felonious assault. Defendant was sentenced to a total prison term of six years, and appeals from the judgment.

Appellant contends (1) that the trial court erred in finding that the prosecution exercised reasonable diligence in attempting to locate the alleged victim and in admitting his preliminary hearing testimony and (2) that the trial court erred in instructing the jury with CALJIC No. 17.41.1.

FACTS

Viewed in the light most favorable to the judgment (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established the following. About 6:40 a.m. on June 30, 2000, appellant asked Santos Gama for money. When Gama did not comply with appellant's request, appellant struck Gama in the face. Appellant also repeatedly hit Gama in the face with a beer bottle, causing a cut to Gama's lip and a new scar on his forehead. As a result of the injury to his lip, Gama was taken to the hospital, where he received stitches. After the incident, Gama noticed that $80 was missing from his pocket.

When Gama was in the hospital, he identified appellant's photograph from a photographic lineup, indicating to South Gate Police Detective Barry Scott that Gama thought appellant's photograph looked like the perpetrator. Although Gama spelled his

first name "Santo" on the photographic lineup admonition form, he testified that his first name is Santos.

In defense, appellant testified that as he was reaching to pick up his own wallet, which was on the ground, Gama pushed appellant in the back, knocking appellant to the ground. Appellant got up and punched Gama, knocking Gama to the ground. Gama got up, picked up a large rock, and threw it at appellant. Appellant ducked, picked up a bottle, and threw it at Gama. The bottle struck Gama in the face. Appellant did not take any money from Gama.

DISCUSSION

1. Reasonable Diligence

Evidence Code section 1291 provides that the hearsay rule does not bar admission of former testimony if the declarant is unavailable as a witness and the party against whom the former testimony is offered was "a party to the action or proceeding in which the testimony was given" and had an opportunity to cross-examine the declarant with a similar motive for cross-examination as exists in the current proceeding. (Evid. Code, § 1291, subd. (a)(2).)

Evidence Code section 240, subdivision (a)(5), provides that a declarant is unavailable as a witness if the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." The term "reasonable diligence" is often called due diligence.

Gama's preliminary hearing testimony was admitted at appellant's trial after the trial court determined that the prosecution exercised reasonable diligence in attempting to locate Gama. We independently review the undisputed historical facts to evaluate whether the prosecution exercised reasonable diligence in attempting to locate Gama for trial. (*People v. Cromer* (2001) 24 Cal.4th 889, 892-893, 901-903 (*Cromer*).)

The preliminary hearing was held on July 19, 2000. Appellant was arraigned on August 2, 2000, and trial was set for September 29, 2000. After appellant twice obtained

new counsel, the trial date was continued to November 14, 2000. The matter was trailed, and trial ultimately began on November 27, 2000.

At the hearing on the prosecution's efforts to locate Gama, Robert Filter, a senior investigator for the Los Angeles County District Attorney, testified that on November 14, 2000, he was given a subpoena to serve on Gama. Filter reviewed the district attorney's file, and learned Gama was a transient.

Gama had testified at the preliminary hearing that the incident with appellant occurred near the railroad tracks in South Gate just as Gama was arriving at that location. Gama had further testified that he was going to that area to sleep, because he lived by the railroad tracks.

At the due diligence hearing, Filter testified that on November 15, 2000, he called the investigating officer, South Gate Police Detective Scott, to learn how Filter could locate Gama. Detective Scott told Filter that the detective had had no contact with Gama since June 30, 2000, and that the only information Detective Scott had was in the police reports. Filter checked booking records, the "event index records," and the California Department of Motor Vehicles (DMV) records, but did not find any record of Gama in those sources.

Filter further testified that on November 20, 2000, he checked the California Identification Index (CII) and booking records for Gama, but had negative results. That same day, he and supervising investigator Frank Mendibles went to the scene mentioned in the police reports, and Filter noticed the location of the scene was near the Union Pacific Railroad tracks. That afternoon, Filter faxed a photograph of Gama and a brief summary of the police reports to the Union Pacific Railroad Police Department.

On November 21, 2000, Filter and investigator Steven Koval went to the area of the crime scene early in the morning. They did not find anyone at the scene. They then walked about 100 yards to the west, and met three men who appeared to be living near the railroad tracks. Filter and Koval showed the men a photograph of Gama, but none of the men recognized Gama's name or photograph. Filter and Koval then went to two areas that Filter described as "staging area[s]" for day laborers. One such area was a

corner at 8111 Atlantic Avenue. Filter and Koval spoke with the day laborers at the corner and with the clerk of the minimart at that location. None of them recognized the photograph, or said that they knew anyone named Santos Gama.

At the second area that Filter described as a "staging area" for day laborers, a corner at 8301 Atlantic Avenue, Filter and Koval spoke with the day laborers at the corner and with a clerk at the liquor store. The day laborers did not recognize Gama's name or photograph. The clerk said that the person looked familiar but that the clerk was not certain. The clerk had not seen the person for a couple of months. Filter left his card with the clerk, and asked the clerk to call Filter if the clerk saw that person. Filter never received any call from the clerk.

On November 21, 2000, Filter also went to the home address that Gama had given the district attorney's office, and Filter left his business card there. Filter later received a call from Jose Mendoza. Mendoza said that he had lived at the residence for more than a year and that Gama had left the residence more than one year before. Mendoza had had no further contact with Gama, and did not know how to reach him.

Filter further testified that on November 21, 2000, he went to the South Gate Police Department, where he spoke to South Gate Police Officer R. Corbet, who patrols the area where the incident occurred. Officer Corbet said that he remembered the incident and Gama, but that Officer Corbet had not seen Gama since June 30, 2000. Filter spoke with Pacific Union Railroad Special Agent Bob Frye. Frye confirmed that he had received the photograph of Gama and the fax of Filter's summary of the police reports. Frye said that he would show the photograph and summary to officers on other shifts and that he would call Filter if he found anyone who knew Gama.

On November 27, 2000, the first day of trial, Filter checked databases of the Los Angeles County Registrar-Recorder/County Clerk, but was unable to locate any record of a birth certificate, marriage certificate, or death certificate for Gama. Filter also called the Los Angeles County Department of Health Services, which told him that it had no death record for Gama. Filter also checked databases in other counties and states for records of birth, marriage, and death.

On November 27, 2000, Filter also called St. Francis Hospital. The hospital told Filter that Gama had been admitted on June 30, 2000, that he had been discharged on July 2, 2000, and that the hospital had no other records of Gama having been a patient there. The hospital told Filter that its records did not indicate that Gama had given any address. Filter inquired whether the hospital had any information he could use to contact Gama. The woman with whom Filter spoke said that "there was information that should have been there that was not [there]." The only information the hospital had was Gama's name and date of birth.

Filter also spoke to Rosa Rueda in the victim's advocate section of the district attorney's office. Rueda told Filter that there was no record that Gama had contacted the victim-witness program.

On the afternoon of November 27, 2000, Filter reviewed the record checks that he had done on November 15 and November 20. As noted, on November 20, he had checked the records of the CII and booking records, but the record checks were negative. On November 27, Filter again ran "a special search." Filter searched booking records, the event index, and the "C.H.R.R.S." All those searches were negative. Filter also checked the district attorney's adult case management records, but the only record he found for Gama was as the victim in this case. In addition, Filter checked driver's license records in Arizona, Nevada, New Mexico, and Texas, but found no record of licensing for Gama.

Filter testified that he had no knowledge of any other investigator in the district attorney's office having handled this matter before November 14. The office where Filter works has three investigators, and it is common for them to discuss subpoenas on which they are working. Filter is therefore usually aware of the work being done by the other investigators, and the other investigators are usually familiar with his efforts.

On the morning of November 27, 2000, Filter called the Union Pacific Railroad police, but he did not receive a return call.

The record does not reflect that Gama had refused to testify at the preliminary hearing or said that he would not testify at trial. The prosecutor noted, however, that it

did not appear from the transcript of the preliminary hearing that Gama was ordered back to court, and she conceded that, since the district attorney's office knew Gama was transient, it would have been prudent for the deputy district attorney at the preliminary hearing to have had Gama ordered back. The prosecutor assured the trial court that the prosecution would continue its efforts to locate Gama during the trial.

The trial court determined that the prosecution exercised reasonable diligence in attempting to locate Gama.

What constitutes due diligence to secure the presence of a witness depends on the facts of the individual case. (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) "[T]he term 'due diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Cromer*, *supra*, 24 Cal.4th at p. 904.)

We conclude that the prosecution exercised reasonable diligence in attempting to locate Gama. As noted, the record does not reflect that Gama had refused to testify at the preliminary hearing or said that he would not testify at trial. The date for trial was continued and trailed several times. Gama gave the district attorney's office a false address. Gama was a homeless person who slept near the railroad tracks. The investigating officer had not had any contact with Gama. Officer Corbet, who patrols the area where the incident occurred, had not seen Gama since the date of the incident. A clerk at a liquor store near the location where the incident occurred thought Gama's photograph looked familiar, but had not seen that person for a couple of months. Filter checked numerous sources to try to locate Gama, spoke to people in the area where the incident occurred, and continued looking for Gama until the first day of trial. The prosecutor assured the court that the prosecution would make further efforts to locate Gama during the trial.

In *People v. Hovey* (1988) 44 Cal.3d 543, 564, the Supreme Court stated: "[W]e could not properly impose upon the People an obligation to keep 'periodic tabs' on every

material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set." The material witness provisions of the Penal Code are limited to requiring a bond to secure a witness's appearance and a maximum of 10 days in custody for failure to post such a bond. (*Ibid*.; Pen. Code, §§ 878, 879, 881; see also Cal. Const., art. I, § 10 [witnesses may not be unreasonably detained].) Since Gama had apparently disappeared from the area about two months before trial, the prosecution could not have secured Gama's attendance at trial by resorting to the material witness provisions of the Penal Code. (*Hovey, supra*, 44 Cal.3d at p. 564.) That additional efforts might have been made or other lines of inquiry pursued does not affect our conclusion that the prosecution used due diligence in its attempt to locate Gama. It is enough that the prosecution used reasonable efforts to locate him. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

Although here, as in *Cromer*, *supra*, 24 Cal.4th 889, the prosecution did not attempt to serve a subpoena on the material witness until the trial date was only weeks away, in *Cromer*, unlike the present case, the prosecution failed to follow promising leads in an effort to locate the witness. (*Id.* at pp. 903-904.)

2. CALJIC No. 17.41.1

The issue of the propriety of CALJIC No. 17.41.1 is currently pending in our Supreme Court. (*People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462.) In the meantime, we need not engage in conjecture as to how the issue will be resolved. Here, there is no indication the use of CALJIC No. 17.41.1 had any effect whatsoever on the jury's verdicts. There was no jury deadlock, there were no holdout jurors, and there was no report to the court of any juror refusing to follow the law. In addition, appellant's conviction of simple assault on count 1 and felonious assault on count 3 and his acquittal of mayhem on count 1 and robbery on count 2 highlight that the jury felt secure in testing the People's evidence and in acquitting appellant when it

found that evidence lacking. Thus, any error in giving the instruction would not require reversal, regardless of the harmless error standard employed.

We find appellant's argument that instruction with CALJIC No. 17.41.1 was reversible per se is unpersuasive. "[B]y virtue of the California Constitution, reversal is not warranted [for misdirection of the jury] unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 149; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1335 [assuming giving CALJIC No. 17.41.1 constitutes constitutional error, it is not "'structural error,'" and does not require reversal per se].)

DISPOSITION

The judgment is affirmed.

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_____, J.
NOTT

We concur:

_____, P.J.
BOREN

_____, J.
TODD